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IN THE

Supreme Court of the United States

October Term, 1956

ARTHUR E. SUMMERFIELD, Postmaster General, and ABE MCGREGOR GOFF, Solicitor, Post Office Department, *Petitioners*

v.

TOURLANES PUBLISHING COMPANY, and ROY A. OAKLEY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS, ROY A. OAKLEY, OAKLEY & WOOTEN, AND OAKLEY & WOOTEN STUDIO IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals in the *Oakley* case is reported at 231 F. 2d 775, and is reproduced in the Appendix, pp. 27-28, *infra*, to the Brief of Petitioner for Writ of Certiorari filed herein.[1] The unreported District

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[1] References to the appendix, refer to the appendix found in the back of the Brief of the petitioners, Arthur E. Summerfield, Postmaster General, and Abe McGregor Goff, Solicitor, Post Office Department v. Tourlanes Publishing Company, and Roy A. Oakley, et al., Case No. 347, filed herein for Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

Court opinion is reproduced in the Appendix, pp. 24-35, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on March 29, 1956 (Appendix, pp. 28-30, *infra*). By orders of Justice Black, dated June 22 and July 13, 1956, the time for filing a petition for a writ of certiorari was extended to and including August 25, 1956 (Appendix, pp. 35-37, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Sunshine Book case rule (*Summerfield* v. *Sunshine Book Company*, 95 U.S.A. D.C., 169, 221 F. 2d 42, cert. den. 349 U. S. 941), was properly applied by the Court below to the case at bar.

2 Whether petitioners here raise any principles of law or issues which have not been previously determined and decided by this Court against petitioners' contentions.

3. Whether the post office order of September 15, 1955, entered against respondents, should have been voided and obviated in its entirety.

STATUTE INVOLVED

The Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U. S. C. 259a, provides:

> That, upon evidence satisfactory to the Postmaster General that any person, firm corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is

causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrived directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the same named in such orders or pastal notes.

STATEMENT

The respondents accept the statement of the case in petitioners' petition insofar as the same applies, only, as to the respondents, Roy A. Oakley, Oakley & Wooten, and Oakley & Wooten Studio, with the followinng exception thereto and the following additions thereto.

The exception refers to that part of petitioners' statement on page 5 of their Brief in the second paragraph in

the middle of the page "in addition, charge that the Oakley enterprise was being conducted in violation of an affidavit of discontinuance executed by respondent Oakley in 1951, after a prior post office department investigation (O. J. A. 51-52)". Respondent Oakley says to that as follows: That in 1951 he was recalled to military duty in the United States Marine Corps in which he was a non-commissioned reserve officer, for service with United States forces in the Korean conflict. That said affidavit was executed either just prior to or while he was in military service in the Marine Corps in 1951; that said affidavit was extracted from respondent, Oakley, at the insistence of the Post Office Department; and with reference to the alleged post office complaint against him and his enterprise in 1951, respondent Oakley says that he never had a hearing before the Post Office Department and that none of the issues raised in the case at bar, were ever then, in 1951, or later, heard or determined by the Post Office Department administratively or by any Courts judicially. The case at bar involves the only hearing, administratively and judicially ever participated in by respondent, Oakley.

For further statement, respondent Oakley says that in the proceeding before the Post Office Department, said respondents offered testimony of a qualified witness on the question of art, photography and obscenity. This testimony was excluded by the hearinng examiner. During the administrative hearing it was determined that the testimony of qualified experts on art, photography, psychology and obscenity, would if offered, be excluded as immaterial, upon the objection from the assistant solicitor, Post Office counsel, who did object. The hearing examiner confirmed his exclusionary ruling at the hearing, and the solicitor confirmed it in his final decision. Coincident with the issuance of the final decision of the solcitor, the petitioners invoked their "mail stoppage order" of September 15, 1955, against the respondents.

It was conceded by the written opinion of the Hearing Examiner filed June 29, 1955, that at least some 35 items, all, exhibits introduced into evidence by the petitioners, Post Office Department, before the Hearing Examiner, at the administrative hearing, and alleged to have been unlawful and obscene, were actually lawful and proper items for mailing, and were not obscene nor violative of any law or statute.

ARGUMENT

Reasons for Not Granting the Writ.

1. In directing the Post Office to confine the order of September 15, 1955, issued against the respondents herein, to the materials which were before the administrative agency and found to be obscene by the hearing examiner, and none others, the lower court properly applied this court's decision in the case of *Summerfield* v. *Sunshine Book Co.*, 95 U.S.A. D.C., 169, 221 F. 2d 42, cert. den. 349 U.S. 941. In that case the identical statute under consideration here was involved. This court administered a reading of the statute which avoided constitutional issues by limiting the statute to authorization of orders relative solely to activities found to be unlawful. The same statute still obtains now as it did then, and consequently no new question or issue is involved in the case at bar.

It is difficult to comprehend the grounds on which petitioners seek to distinguish the case at bar from the *Sunshine Book* case, supra. They do not contend that the *Sunshine Book* case is wrongly decided, and they do not ask this court to overrule that decision. Petitioners seem to contend that the statute savours of different meanings and different readings in different cases. This concept of a statute having different meanings in different cases where the facts are similar would make its application and administration in accordance with law almost impossible.

In the case at bar, it is admitted that at least thirty-five of the items introduced at the administrative hearing before the Hearing Examiner by government counsel were found "not to be obscene" and were found to be proper subjects for distribution through the mails by the respondents herein.

In issuing its order against the respondents herein, the Post Office Department has proceeded as if the United States Court of Appeals for the District of Columbia Circuit, has never decided the case of *Sunshine Book Company* v. *Summerfield*, supra, and that this court did not deny certiorari, 349 U.S. 941. That case, involving an identical order under the identical statute, as involved and applied in the case at bar, did legally put an end to blanket orders of indefinite duration applying to both lawful and allegedly unlawful activities. The Court said at pp. 47 and 48:

> "In consequence, order of the Postmaster General under Section 259a . . . must be confined to materials already published and duly found unlawful. Whether such limitation is practically possible, in cases like the present, is not for this court to determine . . . . To let the present orders stand would permit the Postmaster General to prevent—in practical effect—the continued publication of a magazine without any advance knowledge that its future issues will be in violation of law, and thus to suppress putatively lawful activities. Grave constitutional questions then would be presented."

The order in the case at bar is not limited to the activities allegedly found by the Post Office Department to be unlawful.

The order in the case at bar applies to all mail or money orders of any type, kind, or nature whatsoever, addressed to the respondents; it thus shuts off mail and money orders applicable to past activities concerning which there was not, and has been no complaint; and it

shuts off mail and money orders relating to any and all future activities of respondents, no matter how lawful they may admittedly be in the premises. The order shuts off all mail concerning matters which the petitioners conceded, admitted, and acknowledged in the administrative hearing as being lawful. Petitioners order of September 15, 1955, shuts off from respondents, personal letters, harmless material, and communications of every sort. The Post Office Department is clearly conceding that it failed to limit its order to the matters which were before it and them, as required by law, and as announced in the *Sunshine Book* case, supra.

The dispute of the petitioners is clearly with the decision of the United States Court of Appeals for the District of Columbia Circuit, and cert. den. 349 U.S. 941, and not with respondents' business, as such. It is clearly evident that the Postmaster General does not like the *Sunshine Book* case decision, supra; that the petitioners are not reconciled to it, and will not obey it. The petitioners have not changed a single word of the standard form of their blanket order which was struck down in the *Sunshine Book* case, supra.

The case is not limited to the nature of a publication, however, and it does not even appear to be limited to publications. It appears to be directed to the distinction between lawful and unlawful activities. That is made clear from the manner in which this Court reaches its conclusion, since it derived that conclusion from *Donaldson* v. *Read Magazine*, 333 U.S. 178 (1948), a fraud order case, in which the Supreme Court's actions indicated to the Court of Appeals that Post Office orders under the fraud order statute

> "must be limited to those activities of a defendant which are unlawful, and that future lawful activities of a defendant cannot be hampered in cases where he is engaged both in lawful and in unlawful activities." 221 F. 2d at 46.

The statute involved here, 39 U.S.C. Sec. 259(a), was modeled upon and copied from the fraud order statute, and was designed to grant no wider powers, and was construed by this Court to be limited in the same manner. See *Sunshine Book Co. -. Summerfield,* supra.

The petitioners herein seek to rely heavily upon *Public Clearing House* v. *Coyne,* 194 U.S. 497 (1904), a fraud order case, for the proposition that it is constitutional to prohibit all incoming mail to a person found to have violated a statute in a single instance. Whether or not that case so holds is irrelevant here, for the United States Court of Appeals for the District of Columbia Circuit has construed 39 U.S.C. 259(a) to avoid the constitutional question, and its reasons for doing so are now immaterial. The statute must be accepted as not posing the issue. The *Coyne* case, however, is distinguishable on many grounds. It involved a person conducting what was solely an illegal business, as noted by the Court of Appeals (221 F.2d 46, footnote 9); it proceeds upon a premise which today would be unthinkable—"that the postal service is not a necessary part of the civil government" and Congress "may annex such conditions to it as it chooses" (p. 506); it intimates that there is no judicial review of the merits of the Postmaster General's decision. Subsequent judicial decisions have long made it clear that the postal service is subject to constitutional restriction to the same extent as other governmental functions.

Respondents respectfully submit that the existence of lawful activities, on their part, as found by the Hearing Examiner and as represented by their exhibits in this case, (respondents introduced into evidence at the hearing before Judge Pine on Motion for Preliminary Injunction, the 46 exhibits excluded by the Hearing Examiner, and the 35 exhibits found to be lawful and not obscene by the Hearing Examiner at the administrative hearing), and as found by the Trial Judge, Judge Youngdahl, are

a legal barrier to any order that may be issued by petitioners purporting to shut off *all* mail to respondents.

2. The petitioners here have not raised any principles of law or issues which have not been previously determined and decided by this Court against said petitioners. Petitioners' request to this Court for a writ to issue in this cause raises nothing new herein, but merely seeks to confound existing law and precedent, and the decisive and positive determination by the courts of the application of the *Statute, 39 U.S.C., 259a*, in cases such as the one at bar, against said petitioners.

The alleged standards invoked by petitioners and relied upon by them herein do not meet the Constitutional requirements in applying the statute in question here. See *Connally* v. *General Construction Company*, 269 U. S. 385, *Schecter Poultry Corp.* v. *U. S.*, 295 U. S. 495, *Lanzetta* v. *New Jersey*, 306 U. S. 451, *Winters* v. *New York*, 333 U. S. 507. Notwithstanding the long history of censorship statutes, many containing an obscenity provision, it is only since *Burstyn* v. *Wilson*, 343 U. S. 495 (1952) that this Court has come to grips with constitutional problems of censorship. Since then this court has without deviation struck down every state censorship statute before it. The case of *Holmby Productions* v. *Vaughn*, 350 U. S. 870, decided October 25, 1955, squarely involves the issue of a statute containing the word "obscene" without further elaboration. The *Holmby* case, supra, appears to be dispositive of the case at bar, for *Holmby* involved the constitutionality of a Kansas statute authorizing the prohibition of exhibitions of films found by the censorship board to be "obscene, indecent or immoral, or such as tend to debase or corrupt morals." The Supreme Court of Kansas, considering the entire phrase as synonymous with "obscene", held that these terms were sufficiently definite to satisfy constitutional requirements. The summary reversal of this attitude and determination by the highest

court in the state of Kansas, by the decision of this court, we respectfully suggest. is a view to the fate of *39 U.S.C. 259a* involved in such a case as the one at bar.

3. Respondents submit that nothing mailed by them was obscene or within the purview of the Statute, 39 U.S.C. 259a. Respondents do not and have never dealt in pornographic material, literature, or "filth", of any nature or kind.

The determination of obscenity should not be left to the views or opinions of one man in the Post Office Department regarding publications and material that come before it. We submit that in judging a publication this Court will (1) look at the publication as a whole rather than at certain parts; (2) consider the effect of the publication on the average reader, rather than on the salacious few; (3) consider whether the work under review is dirt for dirt's sake; and (4) consider whether the dirt for dirt's sake is the dominant feature of the work, so dominant that it outweighs all other merits that the work may have. *United States* v. *One Book Entitled Ulysses*, 5 F. Supp. 182 (S.D.N.Y.) aff'd 72 F. 2d 705 (C.A. 2); *United States* v. *Levine*, 83 F. 2d 156 (C.A. 2); *Parmalee* v. *United States*, 72 App. D.C. 203, 113 F. 2d 729; *Walker* v. *Popenoe*, 80 App. D. C. 129, 149 F. 2d 511.

Respondents state that if certiorari should be granted, however, in this cause, they believe that it should not be limited to the issue set out in the petition for certiorari—that is, the ruling of the Court below that the Post Office order should be confined "to cover only those publications which have been found to be obscene"—but should extend to the contentions of respondents that the order is invalid in its entirety for the following reasons:

1. The administrative finding of obscenity is based upon the erroneous position and contention that "nudity per se is obscene".

2. The testimony of an expert witness for respondents on the subjects of obscenity, art. psychology, photography, and allied subjects was erroneously and improperly excluded at the administrative hearing on the ground that all such testimony is immaterial.

3. That the proffer of evidence, testimony and exhibits showing and tending to show and reveal current standards of art and photography throughout the community and throughout the country, in books, publications and periodicals, many of them being lawfully sent through the mails and submitted at the administrative hearing (46 in number) for a comparison with materials alleged to be obscene and unlawfully sent through the mails by respondents, was improperly and erroneously denied, and such evidence, exhibits and testimony were erroneously excluded in the administrative hearing on the ground that all such testimony is immaterial.

4. The government offered no evidence or testimony at the administrative hearing as to the state of morals or decency from which the respondents' materials were thought to depart, and thus the government failed to lay a basis for a finding of obscenity.

5. The administrative order of September 15, 1955, which was signed by the Solicitor of the Post Office Department in his own name, is invalid and unlawful because the sub-delegation of power to the Solicitor to hear and decide such cases and issue such an order is invalid.

6. The application of Title 39, Sections 259(a) U.S.C., as applied to the business and enterprises of respondents, is unconstitutional, in that it deprives respondents of their property and their lawful right to do business.

7 The statute involved in unconstutional for vagueness, and as being without standards or specificity. The sole statutory criterion consists of four words contained

therein: "obscene, lewd, lascivious, and indecent". Those words do not constitute a sufficiently definite standard to advise persons or respondents here, of their rights, and to afford a basis for administrative determination.

The contentions of the respondents, Oakley, set forth above, were all raised and argued in the District Court below, and were raised, briefed and argued in the United States Court of Appeals for the District of Columbia Circuit, on a cross-appeal. At the conclusion of the oral argument in the Court of Appeals, however, counsel for Oakley stated that he would not press these contentions if the District Court order were affirmed, and the Court of Appeals thereupon affirmed the District Court order and dismissed the Oakley cross-appeal "in order to avoid reaching the difficult constitutional questions raised by Oakley's cross-appeal" (231 F. 2d 775-776, set forth and printed in the appendix to the petition for certiorari at pages 27-28).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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